

COVID-19: State of Disaster in South Africa

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As COVID-19 spread across the world, the first reported case in Africa was not until 27 February 2020 in Nigeria; six days later the South African National Institute of Communicable Diseases (NICD) confirmed the first case in South Africa. Since then, cases have [increased steadily](#) and the first death in South Africa was recorded on 27 March 2020. COVID-19 has shown its potential devastating impact elsewhere, but it is a particular cause for concern in South Africa.

First, while public health strategies such as social distancing and regular hand washing are encouraged, such strategies are a privilege many cannot afford in the crowded informal settlements that accounted for 13% of all households in [2016](#), many of which may not have [access to running water](#). Second, the high rate of TB and HIV among the population, in addition to the number of those not on treatment for HIV, have led to concerns that this could impact the [severity](#) of COVID-19 in South Africa and make its population more susceptible to the virus. Third, while health systems in high income countries (HICs) are being stretched, most South Africans rely on the public health care system that is under-resourced and will struggle to meet the demand of the epidemic. While the virus does not discriminate on the basis of race, sex or borders, it is likely that it will disproportionately affect the poor and those suffering from other co-morbidities. Although the number of cases as of 15 March 2020 in South Africa remained relatively low in comparison to the rest of the world (61 confirmed cases; 0 deaths) President Cyril Ramaphosa stated that '[urgent and drastic](#)' measures were necessary to limit the spread of the virus and address this '[medical emergency](#)'. As such, a State of Disaster was declared by the President on 15 March thereby giving Dr Nkosazana Dlamini Zuma, the Minister of Cooperative Governance and Traditional Affairs power to limit certain rights and freedoms within South Africa.

State of Disaster

A "State of Disaster" is distinct from a "State of Emergency" that can be declared by the President section 37 of the Constitution of South Africa and in terms of the [State of Emergency Act 1997](#). In a State of Emergency, derogations from civil liberties protections under the Bill of Rights such as freedom of assembly are permitted, with some exceptions that include the rights to dignity, life and the right to a fair trial. The courts and parliament retain a supervisory role as the courts have the power to declare a State of Emergency invalid, and any extension of a State of Emergency beyond 21 days must be approved by parliament. A State of Disaster is a temporary measure in which certain rights (such as the rights discussed below) are limited and it may be declared invalid if the requirements for a declaration in s 27(1) of the Constitution are not met. The declaration of a State of Emergency

must be necessary to restore peace and order, and as such, may not be the first step in addressing a health emergency, such as the spreading of a virus. Should the emergency escalate and lead to civil unrest, declaring a State of Emergency may be justified and it [has not been ruled out](#).

The CEO of the South African Human Rights Commission, Tseliso Thipanyane, has [argued](#) that the measures introduced in fact amounts to a State of Emergency (a point echoed by [others](#)), but President Ramaphosa did not want to use that term due to its association with the days of apartheid. The [Disaster Management Act 2002](#) also specifically includes a natural or human occurrence that causes or threatens to cause “death, injury or disease” within its definition of disaster, which would clearly apply to COVID-19, and this may also be why the President opted for a State of Disaster. Whatever the reason, for now the current situation has been designated a [National State of Disaster](#).

Unlike a State of Emergency, the power to declare a State of Disaster is not expressly derived from the Constitution but rather under the [Disaster Management Act 2002](#). Under the Act a National Disaster Management Centre must be established (in this case within the Department of Cooperative Governance and Traditional Affairs) which, amongst other duties, makes recommendations on draft legislation. The exercise of its powers and duties is subject to the direction of the Minister. It is however the national executive (i.e. the Cabinet) that is primarily responsible for coordination and management of the disaster. Regulations can only be made that assist and protect the public, provide relief to the public, protect property, prevent or combat disruption, or deal with disruptive or other effects of the disaster. Under this Act, a series of regulations restricting, amongst other things, the movement of persons, goods and the dissemination of information, were promulgated. These regulations include prohibiting foreign nationals from high risk countries (as defined by the WHO) from entering South Africa from 18 March 2020 and restricting gatherings to 100 individuals. A further series of restrictions, including a “lockdown” on the movement of its citizens from midnight on 26 March were announced on 23 March 2020.

In announcing these further restrictions, President Ramaphosa noted that COVID-19 is particularly dangerous for South Africa in light of the [high levels of poverty, malnutrition and high rates of HIV and TB](#). At the time of the announcements South Africa had the highest number of cases in Africa albeit a low number relative to countries worldwide. The restrictions introduced were at that time the most stringent in Africa, as South Africa was then the only country on the African continent to require all of its citizens to remain at home. The measures announced on 15 March and 26 March represent the most comprehensive limitation on the freedom of movement and assembly of all South Africans since apartheid. A failure to adhere to these measures may result in a [fine \(unspecified\), imprisonment of up to 6 months or both](#).

A State of Disaster lasts for 3 months (unless terminated by the Minister) and can be extended by the Minister one month at a time. There is, thus, no role for Parliament in the declaration, extension or termination of a State of Disaster. However, the Constitutional Court can set aside the declaration of a State of Disaster and it

was [challenged](#) ([and subsequently dismissed](#)) on the grounds that the regulations are violating the rights of South Africans to human dignity, freedom of movement, freedom of trade, occupation and profession, and access to healthcare, food and water. Furthermore, unlike a State of Emergency, the regulations must conform to the Bill of Rights and a court can set aside any regulations that are considered to be an unjustified limitation on these rights under section 36(1) of the Constitution. Under the 2002 Act, parliament is not prohibited from meeting, but the COVID-19 regulations restricting gatherings in effect prevent parliament from meeting.

The [COVID-19 regulations](#) cover any array of measures considered to be necessary to prevent the spread of the virus, but the following are main limitations on the rights and freedoms:

1. Freedom of movement and assembly

The initial restrictions on movement pertained to entry into South Africa and the limitation of gatherings. Initially gatherings of no more than 100 individuals were permitted, but as of midnight 26 March, all gatherings including congregating for prayer is prohibited, with the exception of funerals that are restricted to 50 people. Foreign nationals from high risk countries were prevented from entering South Africa from 18 March. As of midnight on 26 March, all but essential movement is prohibited. The leaving of a residence is only permitted to buy essential goods, seek medical attention, buy medical products, collect social grants, attend a funeral of no more than 50 people, or access public transport for essential services during specified times. Leaving a house for exercise or to walk a dog is not permitted. Movement between provinces and districts is prohibited. Cumulatively, these measures go further than any restrictions on movement under the apartheid government.

Any individual who is suspected of having COVID-19 or has been in contact with a person who has tested positive for COVID-19 cannot refuse to consent to be tested. If the test is confirmed positive, they cannot refuse to submit to treatment, isolation or quarantine. Arguably, such measures are unnecessary as the [Regulations Relating to the Surveillance and the Control of Notifiable Medical Conditions](#) gazetted in June 2017 under the National Health Act 2003 already make provision for the mandatory examination, treatment, isolation and quarantine. Under the 2017 regulations, such an application must be made to the High Court by the Head of a provincial department. The COVID-19 regulations, however, go further as a person who refuses to consent to testing or isolation can be quarantined for 48 hours while a warrant is sought. Section 36(1) of the Constitution requires a limitation of rights to be proportionate. The powers granted under the 2017 regulations appear to be suitable for COVID 19 and it is unclear why an extension of the powers was deemed necessary. Considering there have been no reported cases or indication that people will refuse testing, it is questionable whether this extension of powers is indeed a proportionate response.

2. Restrictions on movement of goods

As of midnight on 26 March, only essential goods may be sold. This includes any food and animal food products; cleaning and hygiene products; medical and hospital supplies; fuel, coal and gas, and basic goods, including airtime and electricity. The selling of alcohol and cigarettes are expressly prohibited. Price controls on certain goods have also been introduced, including toilet paper, hand sanitiser and some food products. Failure to comply can result in a fine, imprisonment of up to 6 months, or both.

3. Censorship

The South African Constitution guarantees freedom of expression and this includes “freedom of the press and other media” and “freedom to receive or impart information or ideas”, which are derogable rights. The COVID-19 regulations criminalise the intentional misrepresentation or publishing of a statement that a person or persons has/have COVID-19. The regulations also criminalise the publishing of a statement (including via social media) that intends to deceive another person about any measure taken by the government to address COVID-19. The focus is on disinformation and is aimed at preventing the spread of [false cures](#) that have been seen in the context of HIV. However, concerns have been expressed by the [Committee to Protect Journalists](#) that this may prompt other jurisdictions to adopt more oppressive press censorship. The risk of censorship that does not observe standards of necessity and proportionality in this time is that it may have the opposite effect and limit access to valuable and reliable information for public health. There is evidence within South Africa that this has already occurred as the Ministry of Health has [stated](#) that the dissemination of information is centralised to government, information requests by the press should be directed to the NICD and has it instructed other experts in South Africa not to talk to the press. Considering the NICD is currently overwhelmed, this has led to concerns that access to information has already been limited.

Enforcement of regulations

Under the 2002 Act, financial, human and other resources may be released and during his 23 March address, President Ramaphosa announced that he had directed the South African National Defence Force (SANDF) to be deployed to support the South African Police Service (SAPS). The SANDF are now patrolling the streets enforcing the lockdown. Already there have been allegations of the [use of rubber bullets](#), as well as [abuse](#), that have already led to calls for investigation.

Conclusion

This is the first time since the post-apartheid “New South Africa” that these basic freedoms have been limited. The limitations on rights are considerable and while recourse to the courts remains open, there is [no compensation for loss](#)

[or damage suffered as a results of these regulations](#). While these regulations apply to the COVID-19 crisis only, it is unclear when this epidemic will be deemed to have passed, and whether they may be used as a template for other public health emergencies which include the current TB and HIV epidemics. While such restrictions, particularly restrictions on movement, are harsh and can be followed in other HICs, it remains to be seen whether these restrictions will ultimately be a near impossible balance between restricting the spread of COVID-19, and depriving many in South Africa of their access to food, water and basic hygiene

